which stated,

> We, the jury in the above entitled action, request the following:
>
> Direction. We have an 11 to 1 vote for death. The one juror empathically [sic] feels her mitigating circumstances are equal to the aggravating circumstances. The other 11 jurors do not all agree with the one juror[']s mitigating circumstances as all being either testimony or evidence that should be considered. Please advise which following circumstances can be considered mitigating circumstances.
>
> 1. Inadequate or insufficient psychiatric help.
> 2. Love/hate relationship with father/mother.
> 3. Daily extreme mental and physical abuse by father, also witness to daily abuse to mother and siblings.
> 4. Religious extremes confused defendant.
> 5. Confusing sexual mores at home (incest), with mother condoning or aware of incest/abuse.
> 6. Accused of death of favorite sister.
> 7. Stress of divorce from family.
> 8. Rejection of mother's love during teen years.
>
> Thank you.

McDowell, 130 F.3d at 835.

The trial court responded to the jury's question by stating,

> You're asking me, in essence, to decide the case for you. You have been instructed as to the law and I hate to throw you out like this.
> But if you go back and read the instructions, in particular you have one instruction in which the mitigating and aggravating factors are listed.
> Then you have another instruction, the concluding instruction which reads as follows:
> "One mitigating circumstance may outweigh several aggravating circumstances or one aggravating circumstance may outweigh several mitigating circumstances. You shall give each the weight to which you find it to be entitled."
>
> Those are the two instructions that I think really apply. I would ask you to go back, reread those instructions...

McDowell, 130 F.3d at 835.

After a conference at the bench, the court asked the foreman, "Does that answer your question?" Id. The foreman answered, "Yes, sir." Id.

The Ninth Circuit held that the jury's confusion regarding whether it could consider certain evidence as mitigating and the judge's failure to correct the apparent misconception violated the Eighth Amendment. The Ninth Circuit observed that although the

jurors had been properly instructed, their understanding was as if the trial judge had instructed them to disregard the mitigating evidence proffered on the defendant's behalf. McDowell, 130 F.3d at 837. "Everyone in the courtroom understood that the defendant's mitigating evidence must be considered by the jury; everyone, that is, except eleven of the jurors–the most important participants at that stage of the proceedings." McDowell, 130 F.3d at 837.

The McDowell court went on to analyze whether the error was harmless. First, the risk created by the confusion of the eleven jurors was that they would impose the death penalty in spite of factors which might call for a less severe penalty. McDowell, 130 F.3d at 838. Second, the trial judge did not identify the exact problem confounding the jurors. Id.

> He simply referred the jurors to the original instructions defining mitigating circumstances. The jurors had these instructions with them all along. Both sides agree the instructions were technically flawless. They were, however, the same instructions that for some unknown reason eleven of the jurors did not correctly understand in the first place. Under these circumstances, we agree with Justice Broussard of the California Supreme Court: "There is no point in reiterating language which has failed to enlighten the jury." People v. McDowell, 46 Cal.3d 551, 581, 250 Cal. Rptr. 530, 763 P.2d 1269 (1988) (Broussard, J., dissenting in part.)

McDowell, 130 F.3d at 838.

"Third, even presuming that the jurors read the instructions after returning from their attempt to obtain guidance from the court, the record gives us no assurance whatsoever that they then understood the law." McDowell, 130 F.3d at 838.

The instant case is indistinguishable in principle to McDowell, and in the sense that the jury in petitioner's case herein was referred to a concededly erroneous jury instruction, this case is even more problematic. Here, the jury received a written instruction that contained a typographical error. While this may appear to have been an obvious error to those reviewing the case in hindsight, it was apparently not obvious to this jury. As observed by the California Supreme Court, there were over 50 references to the sentencing options of life without parole and death by the court and counsel. However, despite, and perhaps *because of*, these references, the jury was sufficiently confused by the instruction, relating the opposite of what they thought they

had been told, as reflected by their need for explanation of the "self-explanatory" instruction. Moreover, in light of the jury's concern about "what would happen" if they failed to reach a verdict [at all], the grammatical sense of Instruction 60 suggested that failure to reach a verdict [at all] would result in life with the possibility of parole. Of course, the court's response that the erroneous instruction was self-explanatory confirmed the error. The state supreme court gave no explanation about why the jury would have disregarded the judge's pinpoint advice, and would have rejected the judge's clear confirmation of the error.[7] Jurors are presumed to follow the court's instructions.

Nor can the court find that the correct, albeit somewhat ambiguous, prior reading of the instruction to the jury cured all problems. Obviously, the jurors' question to the judge to explain the instruction indicated that it had not. In addition, the jurors are not expected to have memorized verbatim the instructions that guide their deliberations simply because the instructions were given once, verbally in court. The jurors looked to the uncorrected written instruction for confirmation of the law for a reason, and what they found was the ultimate misperception of what sentence petitioner could receive.

In McDowell, the Ninth Circuit explained the importance of correcting the jury's misperception of the law:

> Jurors' uncorrected confusion regarding the law may lead to verdicts reached outside of the channel required by Godfrey and the Eighth Amendment. The risk was identified in Lockett. The unremarkable prescription for such confusion is that "[w]hen a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." Bollenbach v. United States, 326 U.S. 607, 612-13, 66 S. Ct. 402, 405, 90 L. Ed. 350 (1956). As the Seventh Circuit has said, Bollenbach places on the trial judge "a duty to respond to the jury's request with sufficient specificity to clarify the jury's problem." Davis v. Greer, 675 F.2d 141, 145 (7th Cir. 1982). This duty exists, among other reasons, because "'[i]n a trial by jury..., the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law.'" Bollenbach, 326 U.S. at 612, 66 S. Ct. at 405 (quoting Quercia v. United States, 289 U.S. 466, 469, 53 S. Ct. 698, 698-99, 77 L.Ed. 1321 (1933)). Moreover,

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[7] And, the fact that the law might settle on a life with the possibility of parole sentence, if the jurors could not reach agreement at all on harsher sentences, is not a nonsensical conclusion.

> when constitutional requirements are involved, the proper execution of this duty is a matter of insuring due process of law as guaranteed by the Fourteenth Amendment. Cf. Estelle v. McGuire, 502 U.S. 62, 112 S. Ct. 475, 116 L. Ed 2d 385 (1991) (jury instruction violates Due Process Clause if it affects an identifiable constitutional rights).

McDowell, 130 F.3d at 838.

Finally, the instruction misrepresented to the jury was not a technical instruction of no significance. The prosecutor had produced evidence of petitioner's criminal record and had argued the potential future dangerousness of petitioner. RT 5287-5288. The written, erroneous instruction by its own terms let the jury know that petitioner could be out in society again. By virtue of their first unanswered question to the judge about what would the sentence be if the jurors could not reach a verdict, combined with the request for an explanation of Instruction 60 which indicated, in part, that petitioner could be paroled, if they could not reach a unanimous verdict on either death or life without parole (not out of the question given the 10-2 split), the jurors demonstrated their unease with the possibility that petitioner could be "out on the street," i.e., the only way to keep petitioner out of society would be to vote for the death penalty. Once it is seen that the instruction posed this problem to the jury, the erroneous, uncorrected, written instruction would have been prejudicial to a reasonable jury.[8]

Finally, the court turns to the issue, not raised by the parties, that the error was "invited" by defense counsel, and therefore is not an actionable error.

In U.S. v. Perez, 116 F.3d 840, 844-845 (9th Cir. 1997) (en banc), the Ninth Circuit held that invited error is reviewed for plain error. However, if an error is both invited and

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[8] Although the record evidence of jury confusion may be (and must be) considered by this court or any reviewing court, taking extra-record evidence upon the actual deliberation of the jury is prohibited. Therefore, this court does not consider the extra-record juror declaration supplied by petitioner indicating that at least one juror was indeed confused, nor could it consider any extra-record evidence by respondent that the jury was not confused. In habeas proceedings, just as in federal trials, the court may not take extra-record evidence on the internal deliberations of the jurors, McDowell, supra (107 F.3d at 1367), nor may the court take evidence to determine the subjective impact of an error on their deliberations . Rodriguez v. Marshall, 125 F.3d 739, 745 (9th Cir. 1997); Jeffries v. Wood, 114 F.3d 1484, 1491 (9th Cir. 1997) (en banc).

involves the intentional relinquishment or abandonment of a known right, then the error is waived and unreviewable. Perez, 116 F.3d at 845. As reflected in the initial quotation from the record, defense counsel proffered the erroneous instruction. However, the instruction was discussed with the court at the conference, and unfortunately, the error was not perceived by anyone–even the judge who read the instruction at that time. It is clear from the colloquy concerning the instruction, and defense counsel's professed belief expressed during final argument that the correct non-death penalty was life *without* the possibility of parole, that the error in Instruction 60 was unintentional. Clearly, the instruction was not proposed as part of a tactical plan of defense counsel. Moreover, the trial judge (momentarily) discovered and rectified the error when he read the instruction to the jury. It was the failure of the court to rectify the error on the written instructions that is the final error of consequence here.

Assuming that the error was invited at all, albeit inadvertent, turning to the final element, i.e., was the error "plain," "'we consider all circumstances at trial including the strength of the evidence against the defendant.'" Perez, 116 F.3d at 847 (quoting United States v. Campbell, 42 F.3d at 1199, 1204 (9th Cir. 1994)). The court considers whether the error warrants correction as "seriously affect[ing] the fairness, integrity or public reputation of judicial proceedings." Perez, 116 F.3d at 848 (quoting Olano, 507 U.S. at 736, 113 S. Ct. at 1779). "In the context of plain error review, for an error to affect substantial rights, 'in most cases it means that the error must have been prejudicial.'" Perez, 116 F.3d at 847 (quoting Olano, 507 U.S. at 734, 113 S. Ct. at 1773). "Normally, although perhaps not in every case, the defendant must make a specific showing of prejudice to satisfy the 'affecting substantial rights' prong. . ." Id. In the instant case, the court must consider whether the jury would have sentenced petitioner to death had they been properly instructed. This is an almost impossible task for any reviewing court to undertake, but one which nonetheless must be made.

At the time the jury asked the court to explain Instruction 60, the jury was split ten to two. It is, of course, unknown how many of the ten in favor of the death penalty held the

erroneous impression given by the written instruction that petitioner could be paroled.[9] The jury asked the judge regarding the consequences of their failure to reach agreement. In light of these circumstances combined with the seemingly confirmed improper impression that petitioner could be sentenced to life with parole if the jurors could not agree, the court cannot find that petitioner would probably still have been convicted of the death penalty. While the aggravating evidence against petitioner was fairly strong (but weaker or not as egregious than that in many reported cases), significant mitigating evidence was presented, and some jurors clearly had initial doubts as to the appropriateness of the death penalty. After being instructed that, if any juror possessed a reasonable doubt about the harsher penalties, their choice to sentence petitioner to life with parole was self-explanatory, at least two jurors changed their minds. Under these circumstances, the court cannot say that petitioner would have been sentenced to death had the jury been properly instructed. If McDowell is to be followed, the error seriously affected the fairness and integrity of the judicial proceedings.

For these reasons, the COURT RECOMMENDS that the petition be granted as to Claim 36 (in part) and Claim 40.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within twenty days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised

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[9] It is much more likely that the jury was ten in favor of death and two against since the jury ultimately gave a unanimous death verdict.

that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: March 3, 1998.

GREGORY G. HOLLOWS
U. S. MAGISTRATE JUDGE

GGH:gh:de
morris36-40

kdc

United States District Court
for the
Eastern District of California
March 3, 1998

* * CERTIFICATE OF SERVICE * *

2:92-cv-00483

Morris

v.

Vasquez

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on March 3, 1998, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

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Exhibit B

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EASTERN DISTRICT OF CALIFORNIA
BY _____ DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

BRUCE MORRIS, Petitioner, v. **ARTHUR CALDERON,** Respondent.	CIV S-92-0483 EJG GGH P

RESPONDENT'S OBJECTIONS TO THE FINDINGS AND RECOMMENDATIONS OF THE MAGISTRATE JUDGE FILED MARCH 3, 1998

139

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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

BRUCE MORRIS, Petitioner, v. **ARTHUR CALDERON,** Respondent.	CIV S-92-0483 EJG GGH P

Respondent respectfully objects to the findings and recommendations of the Magistrate Judge to the effect that this Court should grant claims 36 (in part) and 40 of the amended Petition for Writ of Habeas Corpus. In these claims, Petitioner alleges he was prejudiced by the trial court's failure to correct an erroneously type-written instruction during his penalty phase. The findings and recommendations omit significant facts and fail to properly analyze whether the alleged error had a substantial and injurious effect or influence on the jury's death verdict in this case. Even if this jury had been

properly instructed in accordance with the correct instruction, it would have returned a verdict of death in Petitioner's case. Review of the Magistrate Judge's findings and recommendations is de novo. *Gordon v. Vasquez*, 859 F. Supp. 413, 416 (E.D. Cal. 1994) disapproved on other grounds in *Calderon v. District Court (Gordon)* 107 F. 3d 757, 761 (9th Cir. 1997); *Smith v. Heckler*, 595 F. Supp. 1173, 1175 (E.D.Cal. 1984).

Briefly, the claims relate to an erroneous copy of a typed instruction that the jury was given after it was correctly instructed during the judge's oral instruction in Petitioner's penalty phase. The erroneously typed instruction read as follows:

> "If you have a reasonable doubt as to which penalty to impose, death or life in prison without the possibility of parole, you must give the defendant the benefit of the doubt and return a verdict fixing the penalty of life in prison **with** the possibility of parole." [emphasis on obvious typographical error added].

Obviously, the instruction should have told the jury that the appropriate penalty was "life without the possibility of parole." Earlier, however, the court read the instruction correctly to the jury and had instructed the jury that the instructions controlled as "read" (1991) regardless of any modifications or delineations to the type-written instructions. *People v. Morris*, 53 Cal. 3d at 231.

After deliberating for a day, the jury returned to court with the following inquiry: "In the event the jury cannot decide 100% on the penalty phase of the case what would be the sentence imposed? Please explain noted page of instructions." The noted page was the above-mentioned instruction with the typographical error.

The trial court answered the jury's question as follows:

> "The statutes provide for what happens in the event that you folks aren't able to reach a decision, but I can't tell you what that is at this point in time. So that's the answer to your first question. I am unable to tell you. The answer to your second question is that I feel as though the instruction itself is self-explanatory. And we would hope with that in mind, that you might be able to reach a decision."

The jury then deliberated approximately four additional hours and the next day returned a verdict of death. *People v. Morris*, 53 Cal. 3d at 22.

Subsequently, the California Supreme Court rejected a claim that Petitioner was prejudiced by the erroneously typed instruction. Based on the entire record, the state high court held that the jurors would not have reached the illogical and impossible conclusion that if the jury deadlocked on the choice of death or life imprisonment without the possibility of parole, that Petitioner would receive only life with the possibility of parole. *People v. Morris*, 53 Cal. 3d at 227-232. The Magistrate Judge, relying on the Ninth Circuit's recent en banc opinion in *McDowell v. Calderon*, 130 F. 3d 833 (9th Cir. en banc 1997), disagrees with the California Supreme Court and recommends that the petition be granted on these claims.

Respondent objects to the findings and recommendations of the Magistrate Judge.

A. Objections to the Presentation of Facts in the Findings and Recommendations

The Magistrate Judge's summary of the facts is significantly incomplete in two particulars. First, the Magistrate Judge omits the fact that the jury in this case was also instructed that if Petitioner was sentenced to life imprisonment without the possibility of parole that he would never be released. Second, the Magistrate Judge omits the fact that the jurors were only provided verdict forms that gave them a choice between death and life imprisonment without the possibility of parole. *People v. Morris,* 53 Cal. 3d at 229-230.

B. Objections to the Conclusion that Petitioner was Prejudiced by the Erroneously Typewritten Penalty Phase Instruction:

The Magistrate Judge's findings and recommendations should be analyzed and rejected on two levels. First, contrary to the findings, the California Supreme Court correctly found that it was neither reasonably likely nor possible that the jury was mislead by the erroneous instruction. Second, even assuming that the jury did follow the

erroneously typed instruction, the Magistrate Judge's conclusion that Petitioner was prejudiced is wrong.

It is presumed that the jurors follow the court's instructions. F&R at p. 10. Instructions should be construed as a whole and in the context of the entire trial. *Cupp v. Naughton*, 414 U.S. 141, 147 (1973). Furthermore, it is presumed that jurors intelligently deliberate and strive to understand and make sense of the instructions. There is no error if it is not "reasonably likely" the jury construed the instructions in a prejudicial manner. *Boyde v. California*, 494 U.S.370, 380-381 (1990); *United States v. Olano*, 507 U.S. 725, 740 (1993).

Instructions must also be analyzed in terms of the actual thinking process the instructions will engender among the jurors. *California v. Ramos*, 463 U.S. 992, 1003 fn. 17 (1983). It should not be presumed that jurors will act irrationally about their verdict options. *Schad v. Arizona*, 501 U.S. 624, 647-648 (1991); *see also Strickland v. Washington*, 466 U.S. 668, 694 (1984) cited with approval in *People v. Olano*, 740-741. Jurors will reject untenable instructions. *California v. Brown*, 479 U.S. 538, 542-543 (1983) cited with approval in *Boyde v. California*, 494 U.S. at 381.

Petitioner is entitled to relief only if the misinstruction had a substantial and injurious effect or influence in determining the jury's verdict. *California v. Roy*, ___ U.S. ___, 117 S. Ct. 337, 338 (1996). Thus, relief cannot be granted because of the mere "reasonable possibility" the error contributed to the verdict. *Roy v. Gomez*, 81 F. 3d 863, 869 (conc. & dis. opn. of Wallace, C.J.) adopted in *Roy v. Gomez*, 108 F. 2d 242, 243 (9th Cir. 1997) after remand in *California v. Roy*. At the very least, the Petitioner must have suffered "actual prejudice." *Roy v. Gomez*, 81 F. 3d at 869. It is not necessary to establish that the jury necessarily found that death was the appropriate verdict despite the erroneous instructions. *California v. Roy*, 117 S. Ct. at 338.

1. **The California Supreme Court Correctly Found that Petitioner was not Prejudiced by the Erroneously Typewritten Instruction**

The California Supreme Court correctly concluded that Petitioner was not prejudiced by the erroneously typed instruction. It found no "reasonable possibility" or likelihood that the jury was mislead to the "illogical and impossible" conclusion that it was necessary to sentence Petitioner to death or life imprisonment without the possiblity of parole to avoid Petitioner's release on parole. *People v. Morris*, 53 Cal. 3d at 231.[1]

The Magistrate Judge agrees that the California Supreme Court persuasively explained why the jury would not have reached the absurd conclusion that if it could not decide between verdicts of death or life imprisonment without the possibility of parole (hereafter LWOP), that somehow Petitioner would receive a lesser sentence of life imprisonment with the possibility of parole (hereafter LWP). F&R at p. 7. As the state high court noted, the jury had been told repeatedly that there were only two possible sentences in Petitioner's case. All of the arguments of counsel were exclusively directed to the choice between those two sentences. The defense arguments focussed on Petitioner's future dangerousness in prison. The only verdict forms given the jury were for death or LWOP. The trial court had correctly read the instruction to the jury that was later determined to have the erroneous typographical error. As the California Supreme Court explained, the erroneously typed instruction was "both logically inconsistent and physically impossible . . . both illogical and impossible. . . ." *People v. Morris*, 53 Cal. 3d at 229, 231.

The California Supreme Court and the Magistrate Judge part company, however, because of the jury's question to the court that referred to the erroneously typed instruction. F&R at p. 7. The California Supreme Court did not believe that the jury's

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1. The "reasonable possibility" test applied by the California Supreme Court to penalty phase error is a more stringent harmless error test than the "reasonable probability" test. *People v. Brown*, 46 Cal. 3d 432, 446-448 (1988).

question revealed any concern that if the jury deadlocked or "hung," that Petitioner would somehow get the impossible lesser sentence of LWP. Given the entire record, there was no reason to conclude the jury was mislead. *People v. Morris*, 53 Cal. 3d at 229.

The Magistrate Judge believes that the jury's question "beg[ged] the obviousness" of the inconsistency of the erroneous instruction with the other instructions. Since the court told the jury that the erroneous instruction was self-explanatory, the Magistrate Judge concludes that Petitioner was prejudiced. F&R at p. 7 fn. 5.

However, the California Supreme Court's reasoning is more consistent with the standard of review for instructions than the Magistrate-Judge's. The jury's question itself, as the California Supreme Court pointed out, did not indicate the jury's actual concern about the erroneously typed instruction. *People v. Morris*, 53 Cal. 3d at 229.

Respondent submits that the erroneously typed instruction had more than one potential meaning, including a meaning that was not patently irrational. The instruction could also be interpreted as providing that if the jury did not believe beyond a reasonable doubt that either death or LWOP were appropriate penalties for Petitioner, that the sentence received should be LWP. Although the trial court asked the jury about its numerical division before answering the questions, the jury never indicated it was hopelessly deadlocked. The jury's use of the quantification "100%" in its question, indicated that the jury was reading the instruction as pertaining to a situation in which the jury was unconvinced beyond a reasonable doubt that either death or LWP were the appropriate penalty. Given the other instructions and proceedings, this was the only sensible reading of the instruction. There was no reason for the jury to conclude that the defendant should be given the benefit of doubt between two specified penalties "by imposing a third penally that is obviously less severe than either of the first two." *People v. Morris*, 53 Cal. 3d at 229. Such a reading was patently untenable. *California v. Brown*, 749 U.S. at 542-543.

However, even if the jury actually read this instruction, at first blush, as stating that the consequence of a deadlock was that Petitioner would receive the absurd default sentence of LWP, the court's answer to its questions would have compelled it to reconsider such an interpretation. The court admonished the jury that the statute provided for what would happen if it deadlocked, but that the court could not tell the jury what would happen.

As the Magistrate Judge notes, the jury is presumed to follow the instructions. F&R at p. 10. Thus, the jury would have had to conclude that the erroneous instruction was not intended to advise it on the outcome of a deadlock. The court had just told the jury that that result was determined by statute and that the jury could not be told what would happen. The court's response trumped any reading of the instruction as pertaining to a potential deadlock.

Given that admonition, the jury would have had to reinterpret the instruction as advising what the verdict or outcome would be if the jury did not believe that either death or LWOP were appropriate. There is no reason to believe that the jury concluded otherwise. This is the only interpretation that would make sense. Although legally incorrect, such an interpretation favored Petitioner. However, this jury never indicated that it unanimously concluded that there was a reasonable doubt that neither of the harsher penalties was inappropriate.

The Magistrate Judge's findings and recommendations suffer from internal inconsistences. On the one hand, the Magistrate Judge initially agrees with the California Supreme Court that the instruction was illogical and impossible. F&R at p. 7. Yet, the Magistrate Judge later opines that it was "not [] nonsensical" for the jury to believe that if it could not decide between death and LWOP that Petitioner would receive LWP. F&R at p. 10. The Magistrate Judge does not explain how a jury's illogical and impossible reading of an instruction could also be "not nonsensical." The natural conclusion is that an illogical and impossible instruction would also be nonsensical. The

Magistrate Judge concedes that the instruction was illogical and impossible if it was read to ordain a lesser punishment if the jury was unable to choose between two greater punishments. There is no reason to presume that the jury ultimately performed such "nonsensical" mental gymnastics.[2] *California v. Brown*, 479 U.S. at 542-543 (jury would reject "untenable instruction).

The Magistrate Judge also repeats the rule that jurors are presumed to follow instructions. F&R at p. 10. Yet, the findings and recommendations imply that the jury did not follow the trial court's instructions that the results of a deadlock were determined by statute and that the jury was not to be advised of that situation. In the face of this instruction, the jury presumably followed the trial court's instructions and analyzed the erroneously typed instruction in light of those instructions. As unlikely and irrational as it would have been to read the erroneous instruction as ordaining a lesser punishment than the two harsher penalties if the jury could not choose between them, such a reading was unthinkable after the court's answer to the jury's questions. Such a reading would be irreconcilable with the court's admonition that the outcome of a deadlock was determined by statute and that the jury was not to know about it. Obviously, the erroneous instruction was not conveying the procedure that would occur if the jury "hung" between death and LWOP. The trial court had just told the jury that it was not to know about that procedure. The jury would have had to make sense of the instruction in light of the court's answer. The only rational reading was that the instruction was ordaining the sentence Petitioner would receive if the jury did not believe that either death or LWOP were appropriate penalties. There is no reason to presume that the jury simply ignored the court's answers to its questions and persisted in reading the instruction as bearing on the consequences of a "hung jury." Yet, the Magistrate Judge's findings and

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2. As Presiding Justice Puglia of the California Third District Court of Appeal put it in *People v. Cook*, 69 Cal. App. 3d 686 688 (1977): "The law is neither an ass nor an idiot." There is no reason to believe that Petitioner's jury acted like Mr. Bumble in Dickens' Oliver Twist and concluded otherwise.

recommendations indulge in precisely that improper and irrational presumption.[3] There is no "reasonable" likelihood this jury was mislead.

2. Assuming the Jury Actually Believed that Petitioner could receive LWP if the Jury was Deadlocked as to Death or LWOP, Petitioner was still not Prejudiced

The Magistrate Judge concluded that the erroneously typed instruction coupled with the trial court's failure to correct the error posed the problem to the jury that the only way to ensure that Petitioner would never be released on the streets was to "vote for the death penalty." F&R at p. 11. It was not improper, of course, for the jury to consider Petitioner's "future dangerousness", including his potential for endangering the public if released. *California v. Ramos*, 463 U.S. at 1003; *People v. Bean*, 46 Cal. 3d 919, 951 (1988)

The Magistrate Judge's conclusion, however, about the jury's "death dilemma" is wrong. To reach this conclusion, the Magistrate Judge fails to consider the instructions as a whole and "ignore[s] the process of thought [the instructions] inevitably engender[ed] in the jury's deliberations." *California v. Ramos*, 463 U.S. at 1003, fn. 17. When this approach is used, it must be concluded that petitioner was not "actually prejudiced."

The premise of the claim is that the jury was split between death or LWOP and that the erroneously typed instruction raised the specter that petitioner would be eligible for parole if the jury did not reach a verdict between the greater sentences of death or LWOP. The claim then posits that once the jury was told by the court that Petitioner would receive LWP unless it chose between the two greater sentences that the jurors who

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3. The Magistrate Judge also minimizes the California Supreme Court's point that the trial court had read the erroneously typed instruction correctly and instructed the jury that the instructions governed "as read" despite any delineations or modifications in the written instructions. *People v. Morris*, 53 Cal. 3d at 231. The court instructed the jury: "You are only to take the text as read to you." CT 26:5332. The Magistrate Judge noted that there were no modifications or delineations "on the written question[sic][instruction] at issue." F&R at p. 7 fn. 6. This is patently false. The written instruction was modified from the instruction as read by the substitution of "life with the possibility of parole" for "life without the possibility of parole."

favored LWOP voted for death as the only way to preclude Petitioner's potential release. It is also necessary to assume that the jurors who favored death were stubbornly determined to vote for that option and force a deadlock even though that meant that the Petitioner would actually receive LWP, not just LWOP. As the Magistrate Judge explains, "[T]he jurors demonstrated their unease with the possibility that petitioner would be 'out on the street', i.e., the only way to keep petitioner out of society would be to vote for the death penalty." F&R at p. 11.

When the instructions are considered as a whole, however, this required reasoning collapses on its own premise. As the California Supreme Court noted, the jury in this case was specifically instructed:

> "You are instructed that life without parole, that verdict, means exactly what it says. That the defendant shall be imprisoned for the rest of his life. And you are instructed that the death verdict means exactly what it says. That the defendant will be executed. For you to conclude otherwise would be to rely upon speculation or conjecture and would be a violation of your oath as a juror."

People v. Morris, 53 Cal. 3d at 230.

Thus, this jury was specifically instructed that death was not the only verdict to keep petitioner "out of society". The trial court instructed the jury hat a verdict of LWOP also meant that Petitioner would never be released. Therefore, based on the instructions given, this jury was not confronted with the dilemma posited by the Magistrate Judge--that death was the only verdict that would keep Petitioner out of society. This jury had been specifically instructed exactly to the contrary. The jury was told that if Petitioner received LWOP, he would never be released.

Given these instructions, the only way to explain the Magistrate Judge's finding is to assume that the jurors who favored the death penalty were willing to risk a deadlock and Petitioner's eligibility for parole (LWP) rather than agree to LWOP, thus forcing the LWOP jurors to vote for death. This explanation assumes a level of irrationality on the part of the jurors that is not supported by the record. If the concern of the jury was to

prevent Petitioner's release into society, a death verdict was no better than LWOP given the instructions that LWOP meant that Petitioner would never be released.[4]

The Magistrate Judge assumes that if the jury actually believed that the lesser sentence of LWP was the legally required verdict if the jury could not unanimously choose between death and LWOP, that the jury would impose death rather than LWOP in order to prevent Petitioner's release. Under the circumstances of this case, there is "no basis to assume such irrationality. . . ." *Schad v. Arizona*, 501 U.S. at 624. The jury's "unease" about keeping Petitioner "off the streets" would have been equally quelled by death or LWOP under the court's instructions. Accordingly, the erroneously typed instruction with its mistaken LWP option could not have been the motivating factor in the jury's final verdict based on the instructions in this case. None of the jurors favored a verdict that would result in Petitioner's release.

However, this Court need not engage in the speculation inherent in the Magistrate Judge's findings to conclude that the jury's verdict was ultimately unaffected by the erroneously typed instruction. The jury would have reached the same verdict had the jury been instructed correctly.

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4. Respondents submit that this situation is analogous to the argument rejected by the United States Supreme Court in *Schad v. Arizona*, 501 U.S. 624 (1991). In *Schad*, the defendant argued that the trial court was compelled by *Beck v. Alabama* to instruct on robbery as a lesser included offense. However, the court had instructed the jury on second degree murder as a lesser included offense. The defendant argued that the jury should have been presented the additional option of convicting him of robbery since the jury might have concluded that he was guilty of robbery, but not murder. He asserted that the death verdict was "unreliable" since the jury was not presented the additional option of robbery.

Justice Souter's opinion rejected this contention as follows:

> "The argument is unavailing, because the fact that the jury's 'third option' was second-degree murder rather than robbery does not diminish the reliability of the jury's capital verdict. To accept the contention advanced by petitioner and the dissent, we would have to assume that a jury unconvinced that petitioner was guilty of either capital or second-degree murder, but loath to acquit him completely (because it was convinced he was guilty of robbery), might choose capital murder rather than second-degree murder as its means of keeping him off the streets. Because we can see no basis to assume such irrationality, we are satisfied that the second degree murder instruction in this case sufficed to ensure the verdict's reliability." *Schad v. Arizona*, 501 U.S. at 647-648.

It is important to note that the erroneous instruction at issue was not the only erroneous instruction given in this case. Rather, the trial court indulged Petitioner with a series of defense oriented instructions that are not required by state or federal law.[5] Most significantly, the jury was erroneously instructed that LWOP meant that Petitioner would be imprisoned for the rest of his life. As the California Supreme Court has repeatedly held since the trial in this case, this instruction is inaccurate and misleading since a prisoner might be freed due to the postconviction action of the trial court or the Governor's commutation power. See, e.g., *People v. Osband,* 13 Cal.4th 622, 715 (1996) and cases cited therein. It is not true that LWOP means that a prisoner would be imprisoned for the rest of his life. *Ibid.* Yet, this is exactly what the jury was told. Petitioner had no right to this false instruction defining LWOP as meaning he would never be released from prison. *See California v. Ramos*, 463 U.S. at 1009.

This incorrect and misleading instruction was given at the behest of Petitioner's trial counsel. Apparently, defense counsel were concerned that jurors would believe that a prisoner sentenced to life imprisonment without the possibility of parole could still be released. CT IX:2517. Indeed, in 1982, the dissenter in *People v. Ramos*, 30 Cal. 3d 553, 604 (*Ramos* I) stated that "it is likely that most jurors already know of the Governor's commutation power. Several courts have recognized that the availability of parole and commutation in capital cases is readily understood among lay persons [citations omitted]." *Id*. at 604 (Richardson, J. dis.); *see also State v. Quinsenberry*, 381 S.E.2d 681, 688 (N.C. 1989); *People v. Morse*, 60 Cal. 2d 631, 647 (jurors often entertain ideas of parole laws;

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5. For example, the court specifically enumerated all the examples of mitigating evidence for the jury. *Buchanan v. Angleone*, ___ U.S. ___, 117 S. Ct. 757 (1998). The court instructed that "age" was only mitigating. *Tuilaepa v. California*, 512 U.S. 967 (1994). The court permitted the untethered use of sympathy and compassion as mitigating circumstances. *California v. Brown*, 479 U.S. 538 (1987). The trial court also instructed the jury to apply a reasonable doubt standard to imposing the death penalty. *Harris v. Pulley*, 692 F. 2d 1189, 1195 (9th Cir. 1982); *People v. Rodriguez*, 42 Cal. 3d 730, 777-779 (1986). The trial court also gave a "lingering doubt" instruction. *Franklin v. Lynaugh*, 487 U.S. 164, 172-176 (1988). Moreover, the trial court incorrectly excluded evidence of petitioner's previous escape conviction. RT XXV: 5054; *People v. Boyde*, 46 Cal. 3d 212, 249-250 (1988); CT 26:5335, 5337, 5339, 5341-5342.

California v. Ramos, 463 U.S. at 1004, fn. 19 ("Although. . .most jurors may have a general awareness of the availability of commutation and parole. . . .); *People v. Hunter*, 49 Cal.3d 957, 981 (1989). Even the majority in *Ramos I* would only question whether "jurors are generally aware of the *scope* of the Governor's commutation power. . . ." *Ramos I,* at 600 [emphasis added]. Petitioner's counsel apparently assumed that "jurors might otherwise be aware of the possibility of commutation" and asked for this inaccurate, preemptive instruction defining LWOP. *See People v. Ramos,* 37 Cal. 3d 136, 159 fn. 12 (1984) (*Ramos II*).

Had the jury been properly instructed, there would have been no elaboration on death or LWOP beyond the terms themselves. The jury would have also been told that if there was a reasonable doubt as to death or LWOP, it should impose LWOP. However, the jury would have received no false guarantees that Petitioner would be imprisoned for the rest of his life if LWOP was imposed. Thus, to the extent that keeping Petitioner "out of society" was the decisive factor in this case for this jury--then a death verdict would have been the only possible verdict. The compulsion to reach a death verdict and remove the potential that somehow someday petitioner might be back on the streets would have been as strong with the correct instructions as it was under the regime of erroneous instructions given in this case. *See California v. Ramos*, 463 U.S. at 1011 ("A jury concerned about preventing the defendant's potential return to society will not be less inclined to vote for the death penalty upon learning that even a death sentence may not have such an effect.")

Respondent submits that no matter what prompted the jury's question concerning the court's erroneously typed instruction and the outcome if the jury did not reach a verdict on either death or LWOP, the possibility that Petitioner would be released if the jury did not impose those two sentences could not have been the motivating factor for the jury's ultimate death verdict. In choosing between death and LWOP, the jury was concerned with preventing Petitioner from ever endangering the general public. Under

PUBLISHER'S NOTE:

THE FOLLOWING PAGE WAS UNAVAILABLE FOR FILMING:

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CONCLUSION

Respondent respectfully requests that this Court reject the Magistrate Judge's findings and recommendations and deny claims 36 (in part) and 40. Respondent also requests this Court to not issue a final judgment in this matter until the Magistrate Judge has made findings and recommendations on the remaining claims in the amended petition.

Dated: April 2, 1998.

Respectfully submitted,

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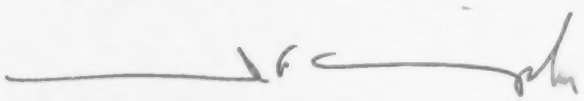

WARD A. CAMPBELL
Deputy Attorney General

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DECLARATION OF SERVICE BY MAIL

Re: *Morris v. Calderon* No. CIV S-92-0483 EJG GGH P

I, the undersigned, declare that I am over 18 years of age, and not a party to the within cause; my business address is P.O. Box 944255, Sacramento, California, 94244-2550. I served a true copy of the attached

RESPONDENT'S OBJECTIONS TO THE FINDINGS AND RECOMMENDATIONS OF THE MAGISTRATE JUDGE FILED MARCH 3, 1998

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

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Each said envelope was then, on April 2, 1998, sealed and deposited in the United States mail at Sacramento, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 2, 1998, at Sacramento, California.

DECLARANT

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

No. 97-1414

ARTHUR CALDERON, Warden

Petitioner,

v.

CHARLES E. MCDOWELL, JR.,

Respondent.

CERTIFICATE OF SERVICE

I, Andrea G. Asaro, a member of the Bar of this Court, hereby certify that on this 8 th day of April, 1998, I caused one copy of Request for Judicial Notice of Petitioner's Judicial Admission in the above-entitled case to be mailed by overnight Federal Express, to all parties required to be served in this matter, as indicated on the attached list. I declare under penalty of perjury that the foregoing is true and correct. Executed this 8 th day of April, 1998, at San Francisco, California.

By: _____
ANDREA G. ASARO

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